Supreme Court, U.S.
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No. 88-956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LSLJ PARTNERSHIP,

Petitioner,

vs.

FRITO-LAY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

EARL E. POLLOCK *
KENNETH H. HOCH
JEFFREY L. DORMAN
LOUIS C. KEILER
SONNENSCHEIN CARLIN NATH
& ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000

Attorneys for Respondent

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

The only question presented is whether the courts below—on the particular facts of this case and after thorough consideration of both the cost data and non-cost evidence adduced by petitioner—correctly held that petitioner ". . . failed to make out even the outlines of a case of predatory pricing" under the Sherman and Robinson-Patman Acts.

RULE 28.1 LISTING

The parent company of respondent Frito-Lay, Inc. is PepsiCo, Inc. Frito-Lay has the following subsidiaries and affiliates (other than wholly-owned subsidiaries):

Fujita Frito-Lay, Ltd.
Presco Corporation
Siam Snack Company, Ltd.
Arnotts Snack Foods
Orion Frito-Lay Corporation
Corina Snack Foods
Pepsi-Cola Allied Bottlers, Inc.
Alpac
Southwest Beverage Corp.
Channel Island Beverage Co., Inc.
& Lindsey Holding Company, Inc.
Pepsi-Cola Bottling of Northern California
Midsouth Acquisition Corporation
Pepsi-Cola General Bottlers
Pepsi-Cola Bottling of Roseburg
Pepsi-Cola Bottling of Bend
Willamette Beverage Co.
ABC Corp.—(Omnitron)
Britvic Corona Ltd.
Serm Suk Co., Ltd.
Taiwan Pepsi-Cola Bottling Company, Inc.
Chicago & Rush
Pizza Hut del Distrito, S.A. de C.V.
Pizza Hut Japan, Ltd.
Pizza Hut (UK), Ltd.
Wendy's Germany
Pizza Hut Restauration GMBH
Pizza Hut S.N.C.
Kentucky Fried Chicken Espana, S.A.
Kentucky Fried Chicken de Venezuela S.A.
International Process Foods
Kentucky Fried Chicken Beijing Limited
Kentucky Fried Chicken (Great Britain) Limited

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Background of the Litigation

Petitioner is the assignee of claims asserted by Jay's Foods, Inc. ("Jays") in an action filed by Jays against respondent Frito-Lay, Inc. ("Frito-Lay") in November 1978.[1]

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[1] In 1986 Jays was sold to Borden, Inc., for $30 million. However, the claims asserted in this action were assigned to petitioner. For ease of reference, since it is Jays' claims which are in issue, petitioner is sometimes referred to herein as "Jays".

In its complaint, Jays charged that Frito-Lay violated § 2 of the Sherman Act and § 2(a) of the Robinson-Patman Act in the pricing and promotion of potato chips in the Chicago area. "[T]he relevant geographic market is the Chicago area and the relevant product is potato chips". (Pet. App. 6a.)

Throughout the period involved in this case (1974-80), Jays was the largest seller of potato chips in the Chicago area. (Pet. App. 24a.) According to Jays (Pet. 6), "The company with the greatest share of potato chip sales controls the entire salty snack food section of the supermarket".

In the pertinent period (1974-80), Jays more than doubled its sales and increased its sales each year.[2] In addition, Jays made substantial profits in each year in the period.[3]

During the same period, although Jays paid dividends to its stockholders each year, Jays' retained earnings nearly doubled.[4] Jays' equity (including treasury stock purchased in 1981) also nearly doubled.[5]

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[2] 1974 — $22,970,172; 1975 — $27,430,101; 1976 — $31,996,614; 1977 — $35,691,531; 1978 — $37,650,107; 1979 — $41,586,256; 1980 — $44,352,969; 1981 — $47,431,378.

References to years in footnotes 2, 3, 4, and 5 are to Jays' fiscal years, each ending January 31 of the designated year.

[3] 1974 — $139,749; 1975 — $825,590; 1976 — $1,957,727; 1977 — $2,319,620; 1978 — $1,280,911; 1979 — $1,795,907; 1980 — $948,557; 1981 — $663,462.

[4] 1974 — $4,108,780; 1975 — $4,290,637; 1976 — $4,996,603; 1977 — $5,825,361; 1978 — $6,277,904; 1979 — $6,835,952; 1980 — $7,141,104; 1981 — $7,366,118.

[5] 1974 — $4,408,780; 1975 — $4,590,637; 1976 — $5,296,603; 1977 — $6,125,361; 1978 — $6,577,904; 1979 — $7,135,952; 1980 — $7,441,144; 1981 — $7,666,118.

Proceedings Below

In the District Court, Jays expressly admitted:

(1) that Frito-Lay's "prices were totally unrelated to the prices charged by other snack food manufacturers";

(2) that "Without regard for any changes in the competitive environment, Frito-Lay blindly determined the amount of price increases needed to meet its company-wide financial targets, and applied that percentage increase to then current prices in each different marketing area";

(3) that "No effort was made to relate Frito-Lay's prices, whether list or net of promotional allowance, to the prices of competitors"; and

(4) that Jays, even while undercutting Frito-Lay's prices, was able both to consistently earn a profit on the sale of its potato chips and to maintain the largest share of potato chip sales in the Chicago area.

In a series of four opinions (Pet. App. 5a-62a), issued over a period of two years, the District Court granted Frito-Lay's motions for summary judgment on each of Jays' claims and dismissed the complaint.

Frito-Lay's summary judgment motions were filed after "full and complete discovery" (Pet. App. 5a) and sought summary judgment on the basis of the discovery record, including in particular Jays' own study of Frito-Lay's potato chip sales in the Chicago Division. (Pet. App. 15a-16a, 20a-21a.)

On the basis of its detailed review of the evidence, the District Court held that "Jays simply has failed to make out even the outlines of a case of predatory pricing" (Pet. App. 28a); that "Even though it has made a Herculean effort, Jays has advanced a case that rests largely upon speculation and conjecture" (Pet. App. 29a); and that "In

order to avoid presenting a jury with such a case, the court has no option under the circumstances but to grant Frito-Lay's motion for summary judgment" (Pet. App. 29a).

Jays did not claim that Frito-Lay priced below its average variable cost (except for a single 4-week period), and the District Court found that "In this case it is near certain that Frito-Lay priced its potato chips above average variable cost". (Pet. App. 25a.) The Court further held that "In sum, the data is so fragmentary that no meaningful judgment can be made as to whether Frito-Lay priced its supermarket potato chips beneath its long-run incremental cost". (Pet. App. 21a-22a.) Similarly, the Court stated: "Here the long-run incremental cost data is too rudimentary for a supportable conclusion that there has been predation". (Pet. App. 26a.)

Contrary to petitioner's assertions (e.g., Pet. 9), the District Court did not limit its analysis to cost evidence. Instead, the Court recognized that ". . . the decisions do require consideration of non-cost factors in conjunction with the application of cost-based measures of predation." (Pet. App. 22a.) The Court then addressed each of the non-cost arguments advanced by Jays. Thus, the Court considered and rejected Jays' arguments based on profit cross-subsidization (Pet. App. 22a-23a), profit maximization (Pet. App. 23a), entry barriers (Pet. App. 23a-26a), and expressions of predatory intent (Pet. App. 26a-27a). With respect to entry barriers, the Court held:

> "In the absence of substantial evidence to the contrary, this court has doubts as to whether the purported entry barriers caused by shelf space limits are unusually high for potato chips. Presumably all products for which supermarket sales are important can be said to have equally high entry barriers. Assuming the existence of entry barriers, it is also unclear

> whether Jays, the largest potato chip supplier in the Chicago area, faced unusual difficulties in maintaining or expanding its share of supermarket shelf space or in penetrating into new supermarkets." (Pet. App. 24a.)

Jays' "intent evidence", the Court held, consisted of "primarily naive expressions of competitive zeal" and was "wholly insufficient to establish Frito-Lay's predatory intent". (Pet. App. 27a.)

On Jays' motion for reconsideration, the Court summarized its position:

> "The heart of the court's opinion is an examination of plaintiff's contentions. The court found that the data about defendant's pricing policy was somewhat fragmentary and did not point towards predatory pricing. The non-price evidence was similarly devoid of substantial evidence supporting plaintiff's claim . . . ." (Pet. App. 34a.)
>
> * * *
>
> "Discovery has long been closed. The plaintiff has the burden of proof. The mosaic which plaintiff presents, in the context of all the evidence, would leave the jury to speculate that there may have been predatory pricing but without sufficient proof, even after viewing the evidence most favorably to plaintiff, that such a conclusion could reasonably be reached as more likely than not. And that is not sufficient. *See Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 54 L.W. 4319 (S.Ct. 3/26/86)." (Pet. App. 36a.)

The judgment of the District Court was affirmed by the Seventh Circuit in an unpublished order. (Pet. App. 1a-4a.) After reviewing the record, the Court of Appeals adopted the District Court's opinions and specifically stated its agreement with the District Court that "Jays simply has failed to make out even the outlines of a case of predatory pricing". (Pet. App. 2a.)

REASONS FOR DENYING THE WRIT

As examination of the decision below readily confirms, the decision is based on the specific facts of this case and, in particular, on petitioner's admissions and deficiencies of proof.

None of the relevant considerations governing review on certiorari, as set forth in this Court's Rule 17, supports the grant of the requested writ. The decision of the Court of Appeals is wholly consistent—and is not in conflict—with the decisions of this Court and the other Courts of Appeals. Nor does the decision below merit review by this Court for any other reason.

I.

THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISION OF OTHER COURTS OF APPEALS.

Petitioner seeks to manufacture a conflict by misstating the decisions and record below. In essence, petitioner attacks a straw-man of its own making.

Contrary to petitioner's assertions (e.g., Pet. 9), the lower courts did not "ignore" petitioner's non-cost evidence. Instead, the District Court, whose opinions were adopted by the Court of Appeals, considered that evidence but found it "unilluminating" and "wholly insufficient". (Pet. App. 27a, 29a.)

Nor is there any basis in the decisions or record for believing that Frito-Lay priced its potato chips "for the express purpose of injuring competition", as petitioner asserts in its statement of "Questions Presented" (Pet. i). Indeed, petitioner admitted below that Frito-Lay priced

solely to meet its financial goals without regard to its competitors' prices. (See *supra*, p. 3.)

The decisions below do not conflict with the predatory pricing standards established either by this Court or by any Court of Appeals. Simply put, the courts below held that, regardless of whether predatory intent may be inferred from prices below variable cost or total cost, Jays had not met either standard (Pet. App. 15a-22a, 25a). In addition, regardless of whether non-cost evidence could be used to demonstrate predatory intent, the courts below found Jays' non-cost evidence to be "wholly insufficient" (Pet. App. 27a, 29a, 2a). Jays' predatory pricing claim was rejected simply because there was a total failure of proof regardless of what standard was adopted.

A. The Decision Below Does Not Conflict With Decisions Allowing The Use Of Non-Cost Evidence In Predatory Pricing Cases.

Petitioner initially suggests that the Seventh Circuit's decision conflicts with Ninth Circuit decisions—notably *Transamerica Computer Co. v. International Business Machines Corp.*, 698 F.2d 1377 (9th Cir.), cert. denied, 464 U.S. 955 (1983)—concerning the role of non-cost evidence in proving predatory pricing (Pet. 10-11). In *Transamerica*, ironically, the Ninth Circuit cited two Seventh Circuit opinions as examples of the proper use of non-cost data. See 698 F.2d at 1387 n.15 ("The Seventh Circuit also recognizes the importance of considering non-price factors in evaluating whether a pricing policy is predatory").[6]

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[6] See *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 432 (7th Cir. 1980) ("while we accept the use

(Footnote continued on following page)

As the Ninth Circuit pointed out in *Transamerica*, the Seventh Circuit has repeatedly stated that non-cost evidence may be used to supplement a showing of predatory pricing. And, as pointed out in the Statement (*supra*, pp. 4-5), the courts below gave ample consideration to Jays' non-cost evidence, but simply found it wanting. The alleged conflict with the Ninth Circuit does not exist.

B. Jays Failed To Adduce Sufficient Cost Evidence To Meet Any Applicable Cost Standard.

Aware that a predatory pricing test based wholly on subjective evidence of "intent" would stifle genuine price competition, every Circuit which has addressed the issue (including the Ninth) has adopted some price-cost test in determining whether predatory pricing has occurred.[7]

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[6] *continued*
of marginal or average variable cost as both a relevant and an extremely useful factor in determining the presence of predatory conduct, we are willing to consider the presence of other factors in our evaluation of whether or not [the plaintiff] has made out a prima facie case of monopolizing or attempt to monopolize"); *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1123 n. 59 (7th Cir.), cert. denied, 464 U.S. 891 (1983) ("we agree, at least in principle, with Judge Wood's advocacy of the use of non-economic (or less rigorous economic) evidence in some cases").

[7] See, e.g., *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 235-36 (1st Cir. 1983); *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76, 88 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982); *Sunshine Books, Ltd. v. Temple University*, 697 F.2d 90, 92 (3d Cir. 1982); *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 888-91 (5th Cir. 1984), cert. denied, 469 U.S. 1160 (1985); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1056-57 (6th Cir.), cert. denied, 469 U.S. 1036 (1984); *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 598 (8th Cir. 1987), cert. denied, 108 S. Ct. 707 (1988); *Trans-*

(Footnote continued on following page)

Petitioner argues that "the decision below falls squarely in the existing conflict among the Circuits on the question of whether prices above incremental cost may be predatory" (Pet. 11). However, irrespective of what differences may exist among the Circuits, petitioner fundamentally misstates the standards applied by the courts below.

A simple review of the District Court's opinion clearly shows that the Court considered all cost evidence presented by Jays. Jays did not prepare a variable cost analysis. Instead, it prepared a total cost study of Frito-Lay's potato chip revenues and costs in Frito-Lay's Chicago Division for the years 1974-80 (Pet. App. 15a). The "study" showed that Frito-Lay's revenues exceeded total cost throughout the period from 1976 to 1980 (Pet. App. 15a-16a), that revenues fell short of total cost by only 3% in 1975 (Pet. App. 16a), and that revenues exceeded total costs during the final eight-week period in 1974 (the only portion of that year within the limitations period). From this evidence, the District Court concluded that there was no evidence that Frito-Lay had priced below variable cost (Pet. App. 16a-17a, 25a), and the District Court's opinions were expressly adopted by the Court of Appeals (Pet. App. 2a).

Jays also claimed to have prepared a study of Frito-Lay's long run incremental potato chip costs for the sales zone (covering all or part of seven states) which contained Chicago (Pet. App. 20a-22a). However, as the District

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[7] *continued*
america Computer Co. v. International Business Machines Corp., 698 F.2d 1377, 1383-88 (9th Cir.), cert. denied, 464 U.S. 955 (1983); *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 795-97 (10th Cir.), cert. denied, 434 U.S. 879 (1977); *Southern Pacific Communications Co. v. American Telephone & Telegraph Co.*, 740 F.2d 980, 1002-07 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005 (1985).

Court noted, Jays merely took a fully distributed cost ("FDC") computation made by Frito-Lay and tacked on an additional cost of 7.5% to 8.5% of sales which supposedly represented the cost of capital. For this reason, the District Court rejected Jays' so-called LRIC study as "inherently of questionable accuracy" (Pet. App. 35a) and as "mov[ing] from the realm of reasonably permissible inferences to the realm of speculation" (Pet. App. 35a-36a). Thus, the courts below found that Jays had failed to produce any reliable evidence showing that Frito-Lay had priced below either variable or total cost.

In sum, this case does not present an issue as to whether variable or total cost is the appropriate standard in predatory pricing cases. The courts below considered both standards and found Jays' evidence inadequate to create a triable issue of fact under either standard.

II.

THE DECISION BELOW IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The Decision Below Is Completely In Accord With This Court's *Cargill* Decision.

In *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117 (1986), this Court pointed out that "Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run."[8] In the present case, as in *Cargill*, there is no need to define the "appropriate measure of cost" since (1) peti-

[8] The District Court adopted substantially the same definition of predatory pricing, which was advanced by petitioner—i.e., the"deliberate sacrifice of current revenues through lower prices for the purpose of driving rivals out of the market." (Pet. App. 10a.)

tioner conceded below that Frito-Lay did not set its prices for the purpose of eliminating Jays or any other competitor, and (2) at no time was Jays threatened with elimination from the market by Frito-Lay's prices.

In the District Court, Jays admitted that Frito-Lay's "prices were totally unrelated to the prices charged by other snack food manufacturers" and that "No effort was made to relate Frito-Lay's prices, whether list or net of promotional allowances, to the prices of competitors." The District Court's finding was to the same effect. (Pet. App. 8a.) In other words, Frito-Lay's pricing was not targeted at eliminating Jays or any other competitor from the market. This squarely precludes any finding that Frito-Lay's pricing was predatory.

Furthermore, according to petitioner's own records and admissions, Jays was never threatened with elimination from the market by Frito-Lay's prices. Jays admits (Pet. 6) that it remained the largest potato chip seller in the Chicago area during the period in question (1974-80). Its total sales grew from $22.9 million in 1974 to $44.3 million in 1980. (Pet. App. 7a; see note 2 *supra*.) Jays also admitted that it did not suffer a loss on its potato chip sales during the years in question. Indeed, Jays' pretax profits rose from $139,749 in 1974 to $2,319,620 in 1977 and were $948,557 in 1980. (Pet. App. 7a; see note 3 *supra*.) In short, Jays was never forced to sustain losses by competing with Frito-Lay's prices. Nor did Jays identify any other firm driven from the market (or threatened with extinction) by Frito-Lay's prices.

Jays nevertheless sought damages for its alleged inability to increase prices to reach a 6% pretax rate of return on sales. (Pet. App. 9a.) In this regard, petitioner's theory of "predatory" pricing is strikingly similar to the theory

which this Court rejected in *Cargill, supra.* In *Cargill,* the plaintiff (Monfort) contended that a proposed acquisition by the defendant (Cargill), while not threatening plaintiff with extinction, would result in, *inter alia,* a price-cost squeeze that would reduce the plaintiff's profit margin. 479 U.S. at 114-15. This Court squarely rejected Monfort's argument, stating

> "The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for '[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.' " (*Id.* at 116, citation omitted.)

Similarly, in this case, Jays does not (and cannot) claim that it was threatened with elimination from the market. Rather, its sole contention is that it could have charged higher prices, earned even higher profits, and maintained an even greater market share. Since Frito-Lay's prices did not threaten to drive Jays from the market, its prices were not predatory no matter what measure of cost is applied.

For all of these reasons, the decision below is not dependent on the particular measure of cost applied or even on resolution of the issue of whether above-cost pricing designed to eliminate a competitor can ever be considered predatory. See *Cargill, supra,* 479 U.S. at 117-18 n.12.

B. There Is No Conflict Between The Decision Below And This Court's Decision In The *Utah Pie* Case.

Petitioner argues (Pet. 12) that the decision below cannot be reconciled with this Court's decision in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), which, like the present case, involved alleged geographic price discrimination in violation of Section 2(a) of the Robinson-Patman Act (15 U.S.C. § 13(a)).

In *Utah Pie*, however, the record was replete with evidence of "persistent sales below cost and radical price cuts themselves discriminatory" (386 U.S. at 702 n.14)—evidence which is totally lacking in this case (Pet. App. 43a).

Furthermore, in *Utah Pie*, this Court emphasized that the evidence showed that the defendants' below-cost sales had an adverse impact on market conditions, i.e., "a drastically declining price structure which the jury could rationally attribute to continued or sporadic price discrimination." *Id.* at 703. Indeed, in *Utah Pie* this Court specifically distinguished the cases on which the defendants relied as not involving a "general decline in price structure attributable to the defendant's price discriminations" and as presenting "no evidence of a long-term market price decline." *Id.*, n.15. In the present case, on the other hand, petitioner has never even asserted that Frito-Lay's pricing has caused or contributed to any such declining price structure. Absent such evidence, or any other evidence of an actual adverse effect on the market, petitioner was obliged to come forward with evidence of predatory pricing, which, as shown above, it has failed to do. (Pet. App. 44a.)[9]

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[9] The Circuits which have addressed the issue have held that the predation standards for § 2(a) of the Robinson-Patman Act

(Footnote continued on following page)

Finally, Jays never even proferred the type of cost data utilized in *Utah Pie*. As Jays states in its petition (Pet. 12), evidence was presented in *Utah Pie* that the challenged prices were less than direct cost plus an allocation for overhead (386 U.S. at 698). In stark contrast, Jays did not submit any evidence of direct cost.[10]

C. The Court Below Properly Applied This Court's Decisions Concerning The Proper Standard For Granting Summary Judgment.

In rejecting the contention that the District Court improperly weighed the evidence in granting summary judgment, the Seventh Circuit expressly applied the standard prescribed by this Court:

> "As *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), makes plain, where the nonmoving party bears the ultimate burden of proof at trial, it must 'make a showing sufficient to establish the existence of [the] element[s] essential to the party's case' in order to

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[9] *continued*
are the same as for § 2 of the Sherman Act. See, e.g., *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1041 (9th Cir.), cert. denied, 459 U.S. 825 (1982); *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 798 (10th Cir.), cert. denied, 434 U.S. 879 (1977); *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 720 n.10 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976). Accord, Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 727 (1975).

[10] Moreover, the only calculation presented by Jays which allegedly indicated below-cost prices required Jays to tack on an arbitrary percentage of sales which supposedly represented Frito-Lay's cost of capital to a profit calculation which already included indirect costs. (Pet. App. 21a.) There is no indication that the direct cost standard utilized in *Utah Pie* permitted inclusion of such a cost of capital component.

withstand a motion for summary judgment." (Pet. App. 2a.)

The District Court also expressly applied the same standard. (Pet. App. 28a, 36a.)

In determining whether a triable issue is presented, the trial court must of necessity decide what inferences may reasonably be drawn from a plaintiff's evidence. This need to "assess the proof" and reject "implausible" inferences does not invade the province of the jury. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986). Citing *Matsushita*, the District Court found that Jays' evidence—both its cost and non-cost evidence—would, at best, permit the jury to engage in impermissible speculation. (Pet. App. 36a.)[11]

In sum, summary judgment was properly granted under the standards most recently set forth by this Court in *Matsushita*, *Celotex*, and *Anderson*, *supra*.

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[11] Although Jays elected not to designate any expert witnesses in the "massive" final pretrial order (Pet. App. 28a), petitioner complains (Pet. 15) that its proposed expert's two affidavits—one filed after the submission of the final pretrial order and after initial briefing on the motion for summary judgment; the other filed with Jays' motion for reconsideration—were not rebutted by "contrary testimony" offered by Frito-Lay. However, as the District Court pointed out (Pet. App. 36a), "A brief affidavit filed after the decision in this case saying that isn't necessarily so is not enough to revive plaintiff's claim even were it to be considered." Furthermore, as this Court recently pointed out, "The existence of 'uncontroverted affidavits' does not bar summary judgment." *Edwards v. Aguillard*, 482 U.S. ____, 107 S. Ct. 2573, 2583 (1987), citing *Celotex*. See also *Matsushita*, *supra*, 475 U.S. at 594 n. 19.

III.

THE DECISION BELOW PRESENTS NO ISSUE WARRANTING REVIEW BY THIS COURT.

As we have shown, the decision below does not conflict with any decision of this Court or of any other Court of Appeals. Indeed, the decision turns entirely on the insufficiency of the evidence adduced by petitioner. That issue is clearly one which does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

EARL E. POLLOCK *
KENNETH H. HOCH
JEFFREY L. DORMAN
LOUIS C. KEILER
SONNENSCHEIN CARLIN NATH
& ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000

Attorneys for Respondent

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* Counsel of Record